## ***Hartford Casualty Insurance Company v J.R.Marketing, LLC*** 8/10/15

Civil Code section 2860; Restitution claim for overbilling

The California Supreme Court has long maintained that if any claims in a third party complaint against a person or entity protected by a commercial general liability (CGL) insurance policy are even potentially covered by the policy, the insurer must provide its insured with a defense to all the claims. (E.g., *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) The insurer's provision of an immediate, complete defense in such a "mixed" action, it is explained, is "prophylactically" necessary, even if outside of the policy's strict terms, to protect the insured's litigation rights with respect to the potentially covered claims. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 49 (*Buss*).) Nevertheless, *Buss* held that the insured would be unjustly enriched at the insurer's expense if not ultimately required to bear the cost of litigating those claims for which the insured had never purchased defense or indemnity protection. Accordingly, the high court held in *Buss* that the insurer may seek reimbursement from the insured of defense fees and expenses solely attributable to the claims that were clearly outside policy coverage.

*Buss* did not consider the related question presented here. From whom may a CGL insurer seek reimbursement when: (1) the insurer initially refused to defend its insured against a third-party lawsuit; (2) compelled by a court order, the insurer subsequently

provided independent counsel under a reservation of rights — so-called *Cumis* counsel (see *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358; see also Civ. Code, § 2860) — to defend its insured in the third party suit; (3) the court order required the insurer to pay all "reasonable and necessary defense costs," but expressly preserved the insurer's right to later challenge and recover payments for "unreasonable and unnecessary" charges by counsel; and (4) the insurer now alleges that independent counsel "padded" their bills by charging fees that were, in part, excessive, unreasonable, and unnecessary?

The *Cumis* decision held that where the insurer provides a defense, but reserves the right to contest indemnity liability under circumstances suggesting that the insurer's interest may diverge from that of its insured, a conflict arises between insured and insurer. In such circumstances, a single counsel cannot represent both the insurer and the insured unless the insured gives informed consent. Absent the insured's consent to joint representation, the insurer must pay the insured's "reasonable cost" for hiring independent counsel to represent the insured's litigation interests under the insured's control.

Here, the insurer urges that it may recoup the overbilled amounts directly from *Cumis* counsel themselves. *Cumis* counsel respond that, if the insurer has any right at all under the facts of this case to recover overbilled amounts, the insurer's right runs solely against its insureds. *Cumis* counsel's erstwhile clients might then have a right of indemnity from these counsel.

In the summer of 2005, appellant Hartford Casualty Insurance Company (Hartford) issued one CGL insurance policy to Noble Locks Enterprises, Inc. (Noble Locks), effective from July 28, 2005, to July 28, 2006, and a second CGL policy to J.R. Marketing, L.L.C. (J.R. Marketing), effective August 18, 2005, to August 18, 2006. In these policies, Hartford promised to defend and indemnify the named insureds, and their members and employees, against certain claims for business-related defamation and disparagement.

In September 2005, an action was filed in Marin County Superior Court against J.R. Marketing, Noble Locks, and several of their employees (the Marin County action). The complaint stated claims for intentional misrepresentation, breach of fiduciary duty, unfair competition, restraint of trade, defamation, interference with business relationships, mismanagement, and conspiracy. Around the same time, related actions were filed against many of the same parties in Nevada (the Nevada action) and Virginia (the Virginia action). In the Marin County action, certain defendants, apparently represented by the law firm of Squire Sanders (US) LLP (Squire Sanders), filed cross-complaints.

On September 26, 2005, defense of the Marin County action was tendered to Hartford under the J.R. Marketing and Noble Locks policies. In early January 2006, Hartford disclaimed a duty to defend or indemnify the defendants in the Marin County action on the grounds that the acts complained of appeared to have occurred before the policies' inception dates, and that certain of the defendants appeared not to be covered insureds. The Marin County defendants, represented by Squire Sanders, thereupon filed this coverage action

against Hartford. Hartford subsequently agreed to defend J.R. Marketing, Noble Locks, and several of the individual defendants in the Marin County action as of January 19, 2006, subject to a reservation of rights. However, Hartford declined to pay defense costs incurred before that date, and also declined to provide independent counsel in place of its panel counsel.

In July 2006, the trial court in the coverage action entered a summary adjudication order, finding that Hartford had a duty to defend the Marin County action effective on the date the defense was originally tendered. The order also provided that, because of Hartford's reservation of rights, Hartford must fund *Cumis* counsel to represent its insureds in the Marin County action. The insureds retained Squire Sanders as *Cumis* counsel.

On September 26, 2006, the trial court in the coverage action issued an enforcement order directing Hartford to promptly pay all defense invoices submitted to it as of August 1, 2006, and to pay all future defense costs in the Marin County action within 30 days of receipt. The order, which was drafted by Squire Sanders and adopted by the court, further stated that Hartford had breached its defense obligations by refusing to provide *Cumis* counsel until ordered to do so and by thereafter failing to pay counsel's submitted bills in a timely fashion. The order also declared that although Squire Sanders's bills "still had to be reasonable and necessary," as a result of its breach, Hartford would be precluded from "invoking the rate provisions of Section 2860." The statute provides, among other things, that the insurer's obligation to pay fees to *Cumis* counsel "is limited to the rates which are actually paid by the insurer to attorneys

retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended." (§ 2860, subd. (c).) The statute specifies that any dispute concerning attorney's fees "shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute."

Finally, the order provided that, "to the extent Hartford seeks to challenge fees and costs as unreasonable or unnecessary, it may do so by way of reimbursement after resolution of the Marin County action." The Court of Appeal subsequently affirmed both the summary adjudication and enforcement orders.

In October 2009, the Marin County action was resolved. The coverage action, stayed during the pendency of the Marin County action, resumed. Hartford thereafter filed a cross-complaint, and then a first amended cross-complaint, against (1) various persons for whom it had allegedly paid defense fees and expenses in the Marin County, Nevada, and Virginia actions, and (2) Squire Sanders. The cross-complaint asserted that Hartford was entitled to recoup from the cross-defendants a significant portion of some $15 million in defense fees and expenses, including some $13.5 million Hartford paid to Squire Sanders pursuant to the enforcement order.

The first amended cross-complaint stated causes of action for reimbursement pursuant to the enforcement order, unjust enrichment, accounting/money had and received, and rescission. It asserted that Hartford was entitled to reimbursement for payment of defense legal services rendered beyond the scope of the enforcement order: (1) to individuals and entities who were not insureds under

the J.R. Marketing and Noble Locks policies; (2) prior to any proper tender by any individual or entity; (3) for any individual or entity in the Nevada and Virginia actions; and (4) for any individual or entity to the extent the services, and the costs thereof, were "abusive, excessive, unreasonable or unnecessary."

Represented by Squire Sanders, the cross-defendants — including Squire Sanders itself — demurred to the first amended cross-complaint. The demurrer stated multiple grounds applicable to all the cross-defendants. Also included, however, was a separate contention that Hartford could assert no legal or equitable claim against "non-insureds, including an insured's independent counsel." In this regard, the demurrer asserted that an insurer's right to reimbursement depends on the contractual relationship between insured and insurer, and that "recognizing a reimbursement cause of action against a law firm would result in undesirable consequences."

On September 27, 2011, the trial court sustained, without leave to amend, the demurrer to the reimbursement and rescission causes of action as to the "non-insured" cross-defendants (identified as Scott Harrington, one of the Marin County defendants, and Squire Sanders). In sustaining the demurrer as to Squire Sanders, the court concluded that Hartford's right to reimbursement, if any, was from its insureds, not directly from *Cumis* counsel. The court indicated that it reached this conclusion based on *Buss v. Superior Court* (1997) 16 Cal.4th 35, 49 and *Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, a decision explaining the public policy against the assignment of legal malpractice actions. The court subsequently entered a

judgment dismissing Harrington and Squire Sanders from Hartford's cross-action.

Hartford appealed, contending that it was entitled to recover directly from *Cumis* counsel for "unreasonable" and "excessive" fees and costs. In essence, Hartford asserted that counsel, not the insureds, had been unjustly enriched by overcharging Hartford for the insureds' defense. The Court of Appeal affirmed the dismissal of both Harrington and Squire Sanders from Hartford's cross-action.

The bulk of the Court of Appeal's analysis focused on Hartford's direct claim against Squire Sanders. The court stressed that restitution is not required merely because one person has benefited another. Instead, the court reasoned, restitution is available only where it would be unjust to allow the person receiving the benefit to retain it, and where restitution would not frustrate public policy. The court noted that Hartford initially breached its duty to defend the Marin County action, thus forcing its insureds to retain their own counsel and negotiate a fee arrangement. Thereafter, Hartford, having reserved its right to contest coverage, was ordered to provide and compensate *Cumis* counsel.

Under these circumstances, the Court of Appeal concluded, allowing Hartford to sue Squire Sanders directly for reimbursement of defense fees and costs would frustrate the policies underlying section 2860 and the *Cumis* scheme generally. **The case law already establishes, the Court of Appeal reasoned, that when *Cumis* counsel is provided following an insurer's breach of its duty to defend, "the insurer loses all right to control the defense."** It cannot thereafter "impose on them its own choice of defense counsel,

fee arrangement or strategy." Instead, counsel chosen by the insureds answer solely to their clients in regard to the clients' litigation interests, free from any insurer involvement in counsel's approach to the insureds' defense. Applying these principles, the court stated that it would "now take the law ***one slight step further*** by holding Hartford likewise barred from later maintaining a direct suit against independent counsel for reimbursement of fees and costs charged by such counsel for crafting and mounting the insureds' defense where Hartford considers those fees unreasonable or unnecessary."

The Court of Appeal reasoned as well that it would be anomalous if Hartford, having "waived" the right to arbitrate fee disputes under section 2860 by breaching its duty to defend, could now place itself in a better position by bringing its claims to court. Finally, the Court of Appeal observed that Squire Sanders had conferred a "benefit" not on Hartford, but on its clients. Accordingly, the court ruled, it is the insured cross-defendants, rather than Squire Sanders, to whom Hartford must look "if it believes the fees were incurred to defend claims that were not covered by the insurer's policies or that the insureds agreed to pay Squire Sanders more than was reasonable for the services that Squire Sanders performed."

The California Supreme Court granted Hartford's petition for review, which raised a narrow question: **May an insurer seek reimbursement directly from counsel when, in satisfaction of its duty to fund its insureds' defense in a third party action against them, the insurer paid bills submitted by the insureds' independent counsel for the fees and costs of mounting this**

**defense, and has done so in compliance with a court order expressly preserving the insurer's post-litigation right to recover "unreasonable and unnecessary" amounts billed by counsel?**

Preliminarliy, it is only due to the wording of the prior court order that Hartford can seek reimbursement, and thus the Court does not address whether where an insurer breaches its defense obligations it has any right to make a claim for recovery of excessive fees. Likewise, the statute provides such disputes would normally be adjudicated by binding arbitration, but the prior court order specifically allowed this action.

Associate Justice Cuellar began his opinion by noting that when an insured under a standard CGL policy is sued by a third party, the insurer's contractual duty to defend the insured extends to all claims that are even potentially subject to the policy's indemnity coverage. (E.g., *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295-296; *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276-277.) Moreover, when the third party suit includes some claims that are potentially covered, and some that are clearly outside the policy's coverage, the law nonetheless implies the insurer's duty to defend the entire action. (*Buss*, at p. 48.) And unless the insured agrees otherwise, in a case where — because of the insurer's reservation of rights based on possible noncoverage under the policy — the interests of the insurer and the insured diverge, the insurer must pay reasonable costs for retaining independent counsel by the insured. (*Cumis*, at p. 375; see § 2860, subds. (a), (b).)

This was such a case. Hartford reserved its right to dispute coverage for some or all of the defendants or claims in the Marin

County, Nevada, and Virginia actions. Accordingly, Squire Sanders acted as the insureds' independent counsel in those suits. It did so pursuant to a court order specifying that Hartford must promptly pay Squire Sanders's bills as and when submitted, but that the firm's charges must be "reasonable and necessary," and that, after conclusion of the underlying litigation, Hartford could seek reimbursement of amounts it deemed excessive by this standard. The order did not specify from whom Hartford might obtain any such reimbursement.

Hartford sought reimbursement from Squire Sanders based on equitable principles of restitution and unjust enrichment. By charging Hartford for fees and expenses that were unreasonable and unnecessary for the insureds' defense, Hartford asserts, Squire Sanders unjustly enriched itself at Hartford's expense and thus owes Hartford restitution for the overbilled amounts.

An individual who has been unjustly enriched at the expense of another may be required to make restitution. (See *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51) Where the doctrine applies, the law implies a restitutionary obligation, even if no contract between the parties itself expresses or implies such a duty. Though this restitutionary obligation is often described as quasi-contractual, a privity of relationship between the parties is not necessarily required. ( see *CTC Real Estate Services v. Lepe* (2006) 140 Cal.App.4th 856, 860-861.)

Restitution is not mandated merely because one person has realized a gain at another's expense. Rather, the obligation arises when the enrichment obtained lacks any adequate legal basis and

thus "cannot conscientiously be retained." (Rest.3d Restitution and Unjust Enrichment, *supra*, § 1, com. b, p. 6.)

The high court addressed whether such an obligation arises for the insured to pay restitution in *Buss*. When the issuer of a CGL policy has met its obligation to completely defend a "mixed" action against its insured, the Court held that the insurer is entitled to restitution from the insured for those fees and costs that were solely attributable to defending claims that clearly were not covered by the policy. *Buss* explained that the insurer never bargained to bear the costs of defending those claims that were manifestly outside the policy's coverage, and that the insured never paid premiums, or reasonably expected, to receive a defense of clearly noncovered claims. Under these circumstances, it would be unjust for the insured to retain the benefit of the insurer paying for defense costs that are beyond the scope of the insurance contract.

As concluded in *Buss*, if an insurer were required to absorb the costs of defending claims it clearly never agreed to defend, it is the *insured* who would gain a direct and unjust enrichment at the insurer's expense. But *Buss*, did not confront the question presented here — i.e., who is "unjustly" enriched if independent counsel representing the insured, but compensated by the insurer, are allowed to retain payments that were unreasonable and unnecessary for the insureds' defense against any claim. In the present situation, Hartford alleges that it is *counsel* who are the unjust beneficiaries of the insurer's overpayments. Thus, the question in this instance is premised on the assumption that counsel's fees were excessive and unnecessary and were not incurred for the benefit of the insured. In

such a case, it is *counsel* who should owe restitution of the excess payments received. As applied here, accepting for the sake of argument that Squire Sanders's bills *were* objectively unreasonable and unnecessary to the insured's defense in the underlying litigation *and* that they were not incurred for the benefit of the insured, principles of restitution and unjust enrichment dictate that Squire Sanders should be directly responsible for reimbursing Hartford for counsel's excessive legal bills.

The Justices emphasize that their conclusion hinges on the particular facts and procedural history of this litigation. As noted, the trial court's September 2006 enforcement order foreclosed Hartford from "invoking the rate provisions of section 2860," but nevertheless admonished that counsel's bills must be "reasonable and necessary," and, citing cases that allow reimbursement actions based on restitution principles, expressly provided that Hartford could challenge Squire Sanders's bills in a subsequent reimbursement action. This enforcement order was upheld on appeal and is now final. The order is valid and the task on appeal is to determine only whether, taking as given that Hartford is entitled to challenge the reasonableness and necessity of counsel's fees in a reimbursement action, Hartford may seek reimbursement directly from Squire Sanders. The Justices conclude that it may, but ***express no view as to what rights an insurer that breaches its defense obligations might have to seek reimbursement directly from Cumis counsel in situations other than the rather unusual facts of this case.***

Squire Sanders invokes the principle that one need not make quasi-contractual restitution for a benefit "incidentally" conferred by

another while the other was performing a pre-existing duty or protecting his own interests. (E.g., *California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 174; see 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 1020, p. 1109.) Here, Squire Sanders posits, Hartford contracted with its insureds to pay the cost of defending potentially covered third party claims against them, and Squire Sanders is merely the "incidental" beneficiary of Hartford's performance of this obligation.

The Court is not persuaded that the **incidental benefits principle** applies to the facts Hartford has alleged. The logic underlying this principle is straightforward: equity does not create a duty to pay for a benefit one neither sought nor had the opportunity to decline, and over which one had no control. When a person acts simply as she would have done in any event, out of duty or self-interest, she cannot equitably claim compensation from anyone who merely happens to benefit as a result.

Neither duty nor self-interest of the kind implicated in the incidental benefits principle accurately explains Hartford's payments to Squire Sanders. Hartford's obligation to pay for independent *Cumis* counsel was not unlimited. Pursuant to the 2006 enforcement order — as well as under the ethical rules that govern attorney conduct generally (see Rules Prof. Conduct, rule 4-200(A)) — its obligation to finance its insureds' defense in the Marin County, Nevada, and Virginia actions did not ultimately extend beyond the duty to pay the reasonable costs of the defense. Nor did Hartford voluntarily pay the alleged "unreasonable and unnecessary" overcharges submitted by Squire Sanders out of some self-interest

extraneous to the benefit conferred on those counsel. Moreover, any such overpayments were not merely an "incidental" benefit to Squire Sanders, fortuitously received by the firm and beyond its power to refuse. On the contrary, Squire Sanders, under the terms of a court order it obtained (and indeed, drafted), submitted bills to Hartford and obtained payment *subject to the express provision that counsel's bills must be reasonable, and that Hartford could later obtain reimbursement of excessive charges*. Under these circumstances, there is no basis for the conclusion that Squire Sanders merely received an incidental benefit it has no equitable obligation to repay.

2. *Objections based on public policy and procedure*

Like the Court of Appeal, Squire Sanders and its amici curiae invoke the premise that restitution on a theory of unjust enrichment is not available when it would frustrate public policy. (E.g., *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1595; *California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1136.) They urge, on various grounds, that to allow a "breaching insurer" such as Hartford to assert a direct right of action against its insureds' independent counsel would contravene the purposes of the *Cumis* rule and section 2860. They further assert that such a direct claim would interfere unduly with the insureds' attorney-client privilege and with their absolute right to dictate and control the defense presented by independent counsel.

Squire Sanders points to the general principle that when an insured is entitled to *Cumis* counsel, that counsel must be " ' "completely independent." ' " (*Musser v. Provencher* (2002) 28 Cal.4th 274, 283 ) Squire Sanders asserts that *Cumis* counsel are

answerable to " ' "solely the insured" ' " and have no attorney-client relationship with the insurer (*Assurance Co. of America v. Haven* (1995) 32 Cal.App.4th 78, 87-88, 90). Squire Sanders further avers that where, as here, the insurer wrongfully refused to defend the insured or to afford *Cumis* counsel, the insured may proceed as he or she deems appropriate, and the insurer forfeits all right to control the insured's defense, including the right to determine litigation strategy. (See, e.g., *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1233) Squire Sanders insists that *Cumis* counsel's independence, zeal, and undivided loyalty to the insureds would be unduly compromised if, while conducting their clients' defense, counsel faced the chilling prospect of the insurer's lawsuit challenging, in hindsight, the reasonableness of counsel's efforts.

The Justices did not agree. Although *Cumis* counsel must indeed retain the necessary independence to make reasonable choices when representing their clients, such independence is not inconsistent with an obligation of counsel to justify their fees. In numerous settings in our legal system, the attorneys representing their clients know they will later have to justify their fees to a third party — including cases brought under fee-shifting statutes, class action settlements, probate, and bankruptcy. Squire Sanders offers no convincing explanation for why attorney independence is possible in these settings, but not here.

What is more, the very statute codifying the *Cumis* doctrine already contemplates that counsel will be called upon to justify their fees. Section 2860 specifically addresses the possibility of disputes about *Cumis* counsel's fees and provides for resolution of those

disputes. By its terms, the statute limits neither the potential "parties to the dispute" (§ 2860, subd. (c)) nor the billing issues that may be raised. Because counsel are billing the insurer, and the insurer is sending its checks to counsel, such a dispute may well arise directly between the insurer and counsel. Thus, under the *Cumis* statutory scheme itself, counsel face the prospect that insurers may question and resist their bills, and insurers are not precluded from doing so in a proceeding directly against counsel.

Squire Sanders also suggests that the process in place when *Cumis* counsel's representation is governed by section 2860 is preferable to a rule allowing the insurer to obtain reimbursement of unreasonable fees under principles of restitution. The "more collaborative" system established by section 2860, Squire Sanders contends, mitigates the risk that an insurer's questioning of counsel's fees will undermine counsel's independence. But it is far from self-evident that section 2860 codifies a "more collaborative process" among the insurer, insured, and counsel. By its terms, section 2860 comes into play only when the interests of the insurer and the insured are so at odds that "the outcome of a disputed coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim." (§ 2860, subd. (b).) **Section 2860 is not triggered simply because an insurer defends under a reservation of rights, the underlying litigation alleges facts under which the insurer would deny coverage, or the litigation includes claims for punitive damages or damages in excess of policy limits.** Given that section 2860 comes into play only when there exists a real and significant disjuncture between the interests of an insurer and its

insured, the Justices fail to see how the degree of tension in the relationship between Hartford and the insureds in this case — even if purportedly higher than in cases where section 2860 is triggered — meaningfully heightens any threat to *Cumis* counsel's independence.

Squire Sanders next argues that, because of the exclusive attorney-client relationship between *Cumis* counsel and the insureds, the insureds alone have the authority and responsibility to monitor and control counsel's expenditures on their behalf. Thus, if the insureds fail to prevent *Cumis* counsel from submitting unreasonable and excessive bills to the insurer, Squire Sanders reasons that the insureds should bear the consequences of this failure — subject to a right of cross-indemnity against counsel.

This argument all but ignores the realities of cases like the one before us. Squire Sanders acknowledges that the insureds in this case were not sophisticated, frequent litigators accustomed to monitoring their counsel's day-to-day litigation decisions. Having contracted with Hartford, and having paid premiums, to be spared the fees and expenses of their defense, there is no indication that the insureds had reasonable cause to expect that they would nonetheless face exposure if Squire Sanders submitted unreasonable and excessive bills to Hartford. Nor is there any indication the insureds expected that they would have to mount and finance a separate litigation against their own counsel in order to have any hope of recovering the funds they were ordered to pay to the insurer as a result of counsel's unreasonable billing. Such a circuitous, complex, and expensive procedure serves neither fairness nor any other policy interest. There

is no persuasive ground to hold that any direct liability to Hartford for bill padding by Squire Sanders must fall solely on the insureds.

Finally, Squire Sanders insists that allowing an insurer to seek direct reimbursement from *Cumis* counsel would contravene California's established prohibition on the assignment of legal malpractice claims. (See generally, e.g., *Musser*, at p. 287.) This prohibition " 'protects the integrity of the uniquely personal and confidential attorney-client relationship.' " It also guards against the unseemly and burdensome commercialization of claims arising from professional duties owed by an attorney exclusively to his or her client. (See *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 Cal.App.4th 1373, 1379; *Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1023-1024.)

As Hartford points out, however, this case is quite different. Hartford does not seek to stand in the insureds' shoes in order to assert a claim that counsel violated a duty to the insureds by performing deficiently on their behalf. Nor does Hartford seek commercial gain by trading in a claim that, by its nature, belongs uniquely and personally to the insureds. On the contrary, Hartford is attempting to recover *legal charges it paid*, under court order, to counsel for their services to the insureds — fees Hartford now contends were excessive for the work that was done.

And as Hartford asserts in response to the concerns Squire Sanders raises about a direct action against *Cumis* counsel, after-the-fact scrutiny of *Cumis* counsel's charges should indeed be quite limited. Hartford agrees that counsel must be "free to represent the insured as they see fit, subject only to generally applicable legal

provisions and professional standards." (*Buss*, at p. 58.) Hence, Hartford argues, **the proper test for any hindsight claim of excessive billing is the same as for a contemporaneous challenge — i.e., whether the charges were *objectively reasonable at the time they were incurred*, under the circumstances then known to counsel.** The Justices agree that Hartford sets forth the appropriate standard for fee disputes of the kind at issue here. They add that **the burden to prove that *Cumis* counsel's fees were in fact unreasonable and unnecessary falls entirely on the insurer.**

**When the insurer seeks to carry that burden in a case such as this one, however, the insurer may proceed directly against *Cumis* counsel in its reimbursement action.** It is emphasized that this conclusion is a limited one, and a particularly apposite one given the history of this litigation. The trial court's 2006 enforcement order plainly permits Hartford to pursue *someone* for reimbursement of allegedly excessive legal charges. The clarity and finality of this order removes from consideration the question whether Hartford, as a "breaching" insurer that was arguably caught shirking its defense duties, ought to be able to pursue *anyone* for alleged overpayments. Similarly off the table is the question of whether the trial court ought to have cut Hartford off from section 2860's arbitration provisions, even as a sanction for its breach. Thus, to the extent Squire Sanders or its amici curiae perceive unfairness in the conclusion that a breaching insurer cut off from the protections of section 2860 should nevertheless retain the right to recoup allegedly excessive legal charges in a later court proceeding, any such unfairness stems from the 2006 enforcement order and not from this holding. Taking the

2006 enforcement order, the Court concludes that equitable principles of restitution and unjust enrichment dictate that Hartford may seek reimbursement for the allegedly unreasonable and unnecessary defense fees directly from Squire Sanders.

Squire Sanders's own conduct in the course of this litigation further supports the conclusion that it is not unjust to allow Hartford to pursue its reimbursement action directly against Squire Sanders. Squire Sanders drafted the very order that expressly preserved Hartford's right to pursue reimbursement for excessive fees and grounded that reimbursement right in principles of restitution and unjust enrichment. The holding that Hartford may pursue its claim for reimbursement against Squire Sanders stems directly from — and is wholly consistent with — that order. Squire Sanders now attempts to avoid the effects of this order by encouraging the Court to foist all responsibility for reimbursement onto its erstwhile clients, but we see no reason to accept that invitation. Under the circumstances, allowing Hartford to pursue a narrow claim for reimbursement against Squire Sanders under the terms of the 2006 enforcement order neither rewards an undeserving insurer nor penalizes unsuspecting *Cumis* counsel.

The judgment of the Court of Appeal is reversed insofar as it upheld the dismissal of Squire Sanders from Hartford's cross-suit, and is otherwise affirmed

Associate Justice Liu provides a concurring opinion evaluating the effect of Hartford's breach of the duty to defend on its present claim.